

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

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PLR-145694-08

Date:

April 21, 2009

Legend

Trust =

Foundation =

Husband =

Wife =

Son =

Special Trustee =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

State =

w =

x =

y =

z =

Company =

State Court =

Case =

Drafting =

Attorney

Dear :

This letter responds to the letter dated September 30, 2008, submitted on Trust's behalf by Trust's authorized representative, requesting rulings under §§ 664, 2036 and 2055 of the Internal Revenue Code.

FACTS

The facts and representations submitted are summarized as follows.

Foundation was incorporated by Husband and Wife in State on Date 1. Husband and Wife have contributed approximately \$w to Foundation since its inception. On Date 2, the Internal Revenue Service issued a determination letter concluding that Foundation is exempt from Federal income tax under § 501(a) of the Internal Revenue Code as an organization described in § 501(c)(3). The determination letter also concluded that Foundation is a private foundation within the meaning of § 509(a).

On Date 3, Husband and Wife executed Trust, a charitable remainder unitrust (CRUT) described in § 664(d)(2). On the same date, each spouse contributed x shares of Company stock to the Trust. On Date 4, Husband and Wife each made an additional contribution of y shares of Company stock to Trust.

Article 1 of Trust designates Son as the initial trustee and designates Special Trustee as the independent special trustee. Article 3 provides that the annual unitrust amount shall be an amount equal to z percent of the net fair market value of the trust property, valued as of the first day of the first calendar month in each taxable year of the Trust. Article 4 provides that in each taxable year, the trustee shall pay the entire unitrust amount annually, outright and free of trust, to Son during his lifetime.

Article 5, Section 1, provides that upon the death of Son, the Trust shall terminate and the trustee shall distribute all of the principal and income, other than any amount then due to Son or his estate, to the Foundation. Article 5, Section 2 provides that Husband and Wife reserve the right, while both are living, to amend or revoke all or any portion of the interest of any one or more charitable remaindermen and to appoint a remainder interest in the Trust to one or more substitute or additional qualified charitable remaindermen in such amounts and in such proportions as they deem appropriate. If both Husband and Wife are living at the time this right is exercised, both must agree to amend the charitable beneficiary designations. If one spouse has died, the survivor may exercise the right.

Article 5, Section 3 provides that "[i]n all events, any charitable remainderman designated in accordance with any section of this agreement must be a qualified organization as defined in Article 13 of this agreement." Article 13 defines "qualified organization" as an organization described in §§ 170(b)(1)(A), 170(c), 2055(a), and 2522(a) of the Internal Revenue Code.

A died on Date 5. In the process of administering Husband's estate, Son became aware of a scrivener's error in the trust instrument of Trust. Specifically, the inclusion of § 170(b)(1)(A) in the definition of "qualified organization" in Article 13 is inconsistent with the designation of Foundation as the charitable beneficiary of the Trust in Article 5. Foundation is an organization described in §§ 170(c), 2055(a), and 2522(a), but is not an organization described in § 170(b)(1)(A). Accordingly, the requirement in Article 5 that requires the charitable remainderman to be a "qualified organization," "in all events," prevents Foundation from qualifying as the charitable remainderman of the trust, despite its designation as such in the trust instrument.

On Date 6, Son, as trustee of Trust, filed a verified "Petition Regarding Construction of Irrevocable Trust and for Approval of Modification of Irrevocable Trust" in State Court. The petition requested the court's approval to correct the scrivener's error by reforming the trust *ab initio* to eliminate the reference to § 170(b)(1)(A) in the definition of "qualified organization" in Article 13. By reforming the trust in this manner, Foundation will be a qualified organization and eligible charitable remainderman under the terms of Trust.

All of the following were offered to State Court in support of Trust's petition. First, Son contended that under State law, State courts have the power to modify the terms of a trust where such modification is necessary to serve the original intentions of the trustors. Case. Second, Wife submitted a declaration to State Court confirming that it was her intention that Foundation would be the charitable remainderman of Trust. Third, Drafting Attorney submitted a declaration to State Court affirming that it was the clear intention of Husband and Wife to designate and allow Foundation to be the charitable remainderman of Trust. Drafting Attorney further affirmed in his declaration that in using his standard CRUT form, Drafting Attorney failed to effectuate the original intent of Husband and Wife because Drafting Attorney did not delete the reference to § 170(b)(1)(A).

On Date 7, State Court issued an "Order Regarding Construction of Irrevocable Trust and for Approval of Modification of Irrevocable Trust" that granted the relief as requested in Trust's petition, contingent upon the issuance of a favorable private letter ruling issued by the Service. State Court determined that the inclusion of § 170(b)(1)(A) in the definition of "qualified organization" in Article 13 was the result of a drafting error and that modifying the trust to delete this reference was necessary to accomplish a material purpose of the trust.

Trust requests two rulings:

1. The judicial reformation of Trust to eliminate the reference to § 170(b)(1)(A) in the definition of "qualified organization" will not cause Trust to fail to qualify as a charitable remainder trust within the meaning of § 664.

2. The retention by Husband of the right to substitute the charitable remainderman of Trust will cause Husband's portion of the remainder interest in Trust to be included in Husband's gross estate under § 2036 and this interest will qualify for a charitable deduction under § 2055.

LAW

Ruling 1

Section 664(d)(2) provides that a charitable remainder unitrust is a trust—

(A) from which a fixed percentage (which is not less than 5 percent nor more than 50 percent) of the net fair market value of its assets, valued annually, is to be paid, not less often than annually, to one or more persons (at least one of which is not an organization described in § 170(c), and, in the case of individuals, only to an individual who is living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals,

(B) from which no amount other than the payments described in § 664(d)(2)(A) and other than qualified gratuitous transfers described in § 664(d)(2)(C) may be paid to or for the use of any person other than an organization described in § 170(c),

(C) following the termination of the payments described in § 664(d)(2)(A), the remainder interest in the trust is to be transferred to, or for the use of, an organization described in § 170(c) or is to be retained by the trust for such a use or, to the extent the remainder interest is in qualified employer securities (as defined in § 664(g)(4)), all or part of such securities are to be transferred to an employee stock ownership plan (as defined in § 4975(e)(7)) in a qualified gratuitous transfer (as defined by § 664(g)), and

(D) with respect to each contribution of property to the trust, the value (determined under § 7520), of such remainder interest in such property is at least 10 percent of the net fair market value of such property as of the date such property is contributed to the trust.

Section 1.664-1(a)(1)(iii)(a) of the Income Tax Regulations provides that the term "charitable remainder trust" means a trust with respect to which a deduction is allowable under §§ 170, 2055, 2106, or 2522 and which meets the description of a charitable remainder annuity trust (as described in § 1.664-2) or a charitable remainder unitrust (as described in § 1.664-3).

Section 1.664-3(a)(3)(ii) provides that a trust is not a charitable remainder unitrust if any person has the power to alter the amount paid to any named person other than an organization described in § 170(c), if such power would cause any person to be treated as the owner of the trust, or any portion thereof, if subpart E, part 1, subchapter J,

chapter 1, subtitle A of the Code were applicable to such trust.

Section 1.664-3(a)(4) provides, in part, that the trust may not be subject to a power to invade, alter, amend, or revoke for the beneficial use of a person other than an organization described in § 170(c). Notwithstanding the preceding sentence, the grantor may retain the power exercisable only by will to revoke or terminate the interest of any recipient other than an organization described in § 170(c).

Under Rev. Rul. 76-8, 1976-1 C.B. 179, a trust that otherwise qualifies as a charitable remainder unitrust may provide that the grantor or a recipient of the unitrust amount may have the power to designate the remainder beneficiary if the remainder beneficiary must be a charitable organization described in §§ 170(c), 2055(a), and 2522(a). The ruling does not require that the remainder beneficiary must also be an organization described in § 170(b)(1)(A).

Based solely on the facts and representations submitted, we conclude that the proposed reformation will not violate any provision under § 664 and the regulations thereunder. Because of a scrivener's error in the original trust agreement and evidence presented that clearly indicates that the proposed reformation is in accordance with the original intent of Husband and Wife, the proposed reformation will not be treated as violating the requirement that the remainder interest to charity must be irrevocable. Accordingly, we conclude that the proposed reformation of Trust will not adversely affect Trust's qualification as a charitable remainder unitrust if it otherwise meets the requirements of § 664 and the applicable regulations.

Note that the percentage limitations set forth in § 170(b)(1)(B) that are applicable to charitable contributions to private foundations (that are not otherwise described in § 170(b)(1)(F)) may limit the amount of Husband's and Wife's charitable contribution deductions for income tax purposes. Similarly, the amount of Husband's and wife's charitable contribution deductions may also be limited by § 170(e)(1)(B)(ii). See Rev. Rul. 79-368, 1979-2 C.B. 109.

Ruling 2

Section 2033 provides that the value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his/her death.

Section 2036(a) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which the decedent has retained for life or for any period not ascertainable without reference to the decedent's death or for any period which does not in fact end before the decedent's death —

(1) the possession or enjoyment of, or the right to the income from, the property, or
(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 20.2036-1(a) of the Estate Tax Regulations states that if the decedent retained or reserved an interest or right with respect to all of the property transferred, the amount to be included in the decedent's gross estate is the value of the entire property, less only the value of any outstanding income interest which is not subject to the decedent's interest or right and which is actually being enjoyed by another person at the time of the decedent's death. If the decedent retained or reserved an interest or right with respect to a part only of the property transferred by him, the amount to be included in his gross estate under § 2036 is only a corresponding proportion of the amount described in the preceding sentence.

Under § 2055(a)(2), for estate tax purposes, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes.

Section 2055(e)(2) provides, in relevant part, that where an interest in property (other than an interest described in § 170(f)(3)(B)) passes or has passed from the decedent to a person, or for a use, described in § 2055(a), and an interest (other than an interest which is extinguished upon the decedent's death) in the same property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to a person, or for a use, not described in § 2055(a), no deduction shall be allowed under this section for the interest which passes or has passed to the person, or for the use, described in § 2055(a) unless, in the case of a remainder interest, such interest is in a trust which is a charitable remainder annuity trust or a charitable remainder unitrust (described in § 664) or a pooled income fund (described in § 642(c)(5)).

In the instant case, Husband transferred property to Trust and, at his death, he had the retained power, together with Wife, to substitute the charitable remainderman designated in the instrument with one or more alternate qualified organizations. Since at his death, Husband's power to designate the persons or organizations who shall enjoy the assets of Trust extended only to the enjoyment of the charitable remainder interest, only the charitable remainder interest is includible in Husband's gross estate under § 2036.

In view of our ruling under § 664 that the proposed reformation of Trust will not adversely affect Trust's qualification as a charitable remainder unitrust, we conclude that the interest passing to Foundation is a charitable remainder interest in a trust which is a charitable remainder unitrust (so long as it otherwise meets the requirements of

§ 664 and the applicable regulations). Accordingly, Husband's estate will qualify for an estate tax deduction under § 2055 equal to the amount of Trust corpus included in Husband's gross estate.

This ruling is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

Pursuant to a power of attorney on file with this office, a copy of this letter is being sent to Trust's authorized representative.

Sincerely yours,

Katherine A. Mellody
Senior Technician Reviewer, Branch 4
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure: copy for section 6110 purposes